

## **The Strength of Proof of Notary Deeds Made Electronically in E-Commerce Transactions in the Indonesian Legal System**

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**Abstract.** *The development of Information and Communication Technology has brought significant positive impacts in various fields of human life today. The various conveniences offered by the development of telecommunications have made it possible for human relations to take place quickly and easily without taking into account the aspects of space and time. Legal certainty can be achieved if there are no conflicting provisions between one law and another. Obstacles experienced in making Electronic Notary Deeds in e-commerce transactions, among others, in terms of legal substance, namely the absence of specific legal certainty that further regulates the application of information and communication technology in making Notary Deeds, in terms of legal structure, namely there is no structure good law, it will be an obstacle for a Notary to carry out his authority in making deeds electronically and in terms of legal culture, namely the development of existing technology, until now it has not been adapted to the legal culture of Indonesian society. The solution in proving the Notary Deed Electronically in E-Commerce Transactions is that when viewed from a juridical perspective, the actions that can be taken are to revise UUJN and ITE.*

*Keywords: Commercial; Electronic; Verification.*

### **1. Introduction**

The development of information and communication technology has had a major positive impact on all areas of human life today. Along with the development and progress of communication media, communication media is able to provide more effective and efficient communication services and functions. This has led to an increasingly diverse range of services (functions) of

existing telecommunications facilities, as well as increasing complexity of information technology products that are able to integrate all information media.<sup>1</sup>

The various facilities provided by the development of telecommunications have enabled human relations to take place quickly and easily regardless of the aspects of space and time. Means that can be done include computers, gadgets, and other devices, and now each of us has easy access to the internet. Notaries as Public Officials who are responsible for serving the community are expected not to be left behind in dealing with the times. This is something must for everyone to get legal protection for every transaction made electronically.

In addition, information technology has become an influential foundation in the life of the surrounding community, starting from the economy, socio-culture, education to law. The term e-commerce is more popular today for transactions made via the internet. As an example of an e-commerce agreement, the application of technology in an electronic contract agreement is not like an agreement in general, but an agreement can be reached even though the two parties do not meet in person, but the agreement between the two parties is made electronically. An agreement between the two parties can be reached simply by visiting the web page that has been provided which contains terms or agreements made between the first party (seller) and another party (buyer).

Agreement in electronic transactions are basically the same as agreements in conventional trade transactions, but the agreements used in electronic transactions are agreements made between parties through an electronic system, otherwise known as electronic agreements.<sup>2</sup> This service notary offered to the public are still traditional. However, with the development of information technology (IT), it is hoped that everyone can migrate from traditional systems to electronic systems at some point in their lives, notary services have also moved to electronic systems or can be called cyber notaries. The role of the Notary is required to be able to participate in the development of technology and information, because in an electronic transaction it is very possible for the intervention of a Notary as a trusted third party like the role of a Notary in a conventional transaction.

Then in practice the idea of cyber notary and electronic notary can be realized in Indonesia, so the strength of proof of information and electronic transactions that have been experienced so far often has a weak proving value, so that its

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<sup>1</sup>Arrianto Mukti Wibowo, 1999, Legal Framework for Digital Signature in ElectronicCommerce, amwibowo@caplin.cs.ui.ac.id , p. 3.

<sup>2</sup>Rudyanti Dorotea Tobing, 2012, Aspects of Business Law, Definition, Principles, Theory and Practice, Lasbang Justia, Yogyakarta, p. 216.

position will strengthen because it can be considered in accordance with an Authentic Deed. This increases public trust and security in electronic transactions. Although the possibility of a Notary to act in an electronic role is not regulated in the Notary Deed, there are other laws and regulations that provide this possibility. Examples include: Government Regulations mandated by the ITE Law, provide opportunities for Notaries to offer electronic certification services.

Therefore, a legal product is urgently needed that aims to increase the security of electronic commerce through electronic networks and recognizes the legal power of electronic evidence and electronic signatures. In reality, cyber activity is no longer easy, because the activity is no longer limited by the territory of the country, easily accessible anytime and anywhere. Losses can occur both for people who make transactions and for other people who have never made a transaction. In addition, authentication is a very important factor considering that electronic data is not only fully adapted to the Indonesian justice system, but also very easy to forge and sent to various parts of the world in a matter of seconds.

## **2. Research Methods**

This study uses a normative juridical approach. The specification of the research used is analytical descriptive. Sources and types of data used include secondary data sources. Secondary legal data includes primary legal materials, secondary legal materials and tertiary legal materials. Using data collection using literature study and document study. Data analysis uses normative qualitative.

## **3. Result and Discussion**

### **3.1. The strength of proof of a Notary Deed made electronically on e-commerce transactions in the Indonesian legal system**

#### **a. Strength of Proof of Notary Deed on e-commerce transactions in the applicable laws and regulations**

The Civil Code is a general provision of the legal rules governing the authority of a Notary as a Public Official, then the Notary's Position Law is a *lex specialis* of regulations governing the duties and powers of a Notary as a Public Official. The problems that will arise in making Authentic Deeds electronically are related to the obligations that must be carried out by a Notary for the deed he makes, as stipulated in Article 16 paragraph (1) UUJN.

R. Subekti and R. Tjitrosudibio, the expression *Openbare ambtenaren* contained in Article 1868 *Burgerlijk Wetboek voor Indonesië* (BW) is translated as a Public

Official. With the translation, Article 1868 BW reads that: An authentic deed is a deed which, in the form determined by law, is made by or before public officials who are in charge for that at the place where the deed is made.<sup>3</sup> According to R. Subekti, what is meant by public employees are Notaries, Judges, Bailiffs at a court and Civil Registry Employees.<sup>4</sup>

Based on the functions of Notary Officials described above, the implementation of the functions and duties of Notary Officials in making Authentic Deeds regarding all actions, agreements desired by the public (interested parties) stated in Authentic Deeds must provide legal certainty. With this authority not yet accommodated in the Law, the implementation of the duties and functions of a Notary in providing electronic deed making services does not yet have legal certainty, giving rise to new legal issues.

#### **b. Use of Electronic Notary Deeds in the perspective of Positive Law**

In making a Notary Deed, it can actually be seen based on 2 (two) approaches or theories that can describe the relationship between technology and law. The two theories can be used in analyzing the application of information technology in making the Notary Deed, namely the instrumental theory and the substantive theory.<sup>5</sup>

Instrumental theory analyzes that in a technology tool that is developed with the principles of rationality and efficiency based on these principles, technology will present or provide rational choices and needs in society. Technology must be neutral and always separate from economic, political, social and cultural processes. Productivity must be objectively measurable, regardless of culture, so that technology can be transferred and utilized from one society to another, or in other words technology can be applied universally. On the other hand, substantive theory shows that technology is not neutral because technology is closely related to the interests of the subject that makes technology what it is meant to be.<sup>6</sup>

Making a Notary Deed electronically there are various legal conflicts that occur, the provisions regarding the authenticity of a deed are regulated in Article 1868 of the Civil Code. Then the various conditions for making a deed regulated in UUJN, make it impossible to make a Notary Deed electronically, for example the provisions of Article 16 paragraph (1) letter m UUJN, which requires a Notary to read the deed before the parties and attended by 2 (two) witness.

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<sup>3</sup>R. Subekti and R. Tjitrosudibio, 2009, Civil Code, Pradnya Paramita, Jakarta, p. 475.

<sup>4</sup>R. Subekti, Op. Ci., p. 178.

<sup>5</sup>Josua Sitompul, 2012, Cyberspace, Cybercrime, Cyberlaw, Tatanusa Jakarta, p. 20.

<sup>6</sup>ibid., p. 40.

Juridically, making a Notary Deed electronically is not yet possible, but with restrictions on the authority of a Notary in making Notarial Deeds electronically as emphasized in Article 5 paragraph (4) of the ITE Law that a Notary Deed or Notary Deed is not included in the intended electronic document. So that it is not possible to make electronic Notary Deeds when referring to the provisions of this article. Thus, in making an electronic notarial deed based on the needs and wishes of the community, it is not necessarily accommodated in the law which can cause there is no legal certainty regarding the authority of a notary in making deed electronically. As a constitutional state (*recht staat*), every authority must have a legal basis.

### **c. Notary legal certainty in making Electronic Notary Deeds for e-commerce transactions in the Indonesian legal system**

To create legal certainty and legal benefits for the community, it is necessary to harmonize laws and regulations related to the authority of a Notary in making electronic deeds, namely between UUJN and UUJN and between UUPT and UUJN. So that the Notary no longer experiences juridical problems regarding his authority in making deeds electronically. Likewise, people who need guarantees for legal actions carried out electronically can only be achieved by accommodating the notary's authority in making electronic deeds in the law. By accommodating all legal issues concerning the authority of a Notary in making electronic deeds, the public will no longer have doubts regarding the various electronic transactions that are carried out.

The opportunity for the process of making an Authentic Deed to be carried out online or only through cyberspace without meeting directly between the parties can be done by removing the requirement that requires the parties to meet. But of course it must be supported by technological sophistication such as teleconference facilities that allow the deed to be read by a Notary through the media and heard and witnessed by the parties online.

Based on the legal substance of the UUJN and the Civil Code which regulate the mechanism for making Authentic Deeds, and the requirements for the authenticity of notary deeds, it is understood that the use of deed made electronically by a Notary does not meet the requirements for the authenticity of an Authentic Deed. So that the use of a deed made electronically by a Notary is not in accordance with the function and purpose of making an Authentic Deed, namely to provide legal certainty and have evidentiary value.

## **3.2. Obstacles experienced in proving Notary Deeds made electronically on e-commerce transactions in the Indonesian legal system and their solutions**

### **a. Barriers to Making Electronic Notary Deeds in e-commerce transactions**

### **1) In terms of legal substance**

The application of information and communication technology in the preparation of the Notary Deed cannot be separated from the influence of legal dogmatics. Legal dogmatics, which aims to describe and systematize in a certain sense and also explain (veklaren) the positive law that applies in Indonesia.<sup>7</sup>

There is no specific legal certainty that further regulates the application of information and communication technology in making Notary Deeds, and the position of Electronic Deeds in the civil procedural law system does not fully recognize the authenticity of electronic evidence/Electronic Deeds as evidence/Authentic Deeds.

Arsyad Sanusi is of the opinion: An electronic document, if it is produced by an Electronic Information system that has been legalized or guaranteed by professionals authorized for that, then it is an Authentic Document, and if the Electronic Information system can continue to work as it should, as long as it is not proven by the parties, the electronic document is accepted as an authentic deed or document, and not a private deed.<sup>8</sup>

### **2) In terms of Legal Structure**

The legal structure that has been built has not been able to encourage the implementation of electronic services by Notaries properly and maximally. Existing electronic notary services also do not support notaries in playing an active role in making deed electronically. This is due to the fact that a good system has not been developed in implementing the Notary's authority in making deeds electronically.

### **3) In terms of Legal Culture**

Legal culture is the same general response that comes from certain communities towards legal phenomena. The current response is a unified view of legal values and behavior. Therefore, a legal culture shows the pattern of individual behavior as a member of society which describes the same orientation (orientation) towards legal life that is lived by the community concerned.<sup>9</sup> Existing technological developments, until now have not been adapted to the legal culture of Indonesian society.

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<sup>7</sup>Otje Salman and Anthon F. Susanto, 2007, *Legal Theory*, Redika Aditama, Jakarta, p. 54.

<sup>8</sup>Surya Jaya, 2012, *Cyber Notary Legal Perspective of Evidence*, paper presented at the Seminar on Cyber Notary Law, Faculty of Law, Hasanuddin University, accessed via: muhammadrizalrustam.wordpress.com, at. 13.30 WIB.

<sup>9</sup>Hilman Hadikusumah, 1996, *Legal Anthropology in Indonesia*, Alumni, Bandung, p. 11.

Although it is stated that law consists of three components, namely structure, legal substance and legal culture, the most influential component is the legal culture component. This implies that no matter how well the law is made, in the end the success of the law will be determined by the legal culture of society.<sup>10</sup>

#### **b. Solutions made in proving Notary Deeds Electronically in E-Commerce Transactions**

The solution made in proving the Notary Deed Electronically in E-Commerce Transactions in Indonesia is that when viewed from a juridical perspective, the action that can be taken is to revise the UUJN and ITE, which is then carried out to harmonize the law between the two laws. So that the making of the Notary Deed electronically can be applied optimally.

Changes to UUJN and UU ITE are urgent matters in meeting the demands of modern society to make deeds electronically. In this case, it is necessary to have a process of harmonization of laws or legal rules, a process of harmonization that has been carried out perfectly and well will minimize conflicts between laws. Likewise, with the application of information technology developments in making electronic deeds by Notary Officials, the harmonization process becomes very important, especially regarding the requirements for certificate authentication because it involves several regulations, which include: the Civil Code, UUJN, UUPT, UU ITE.

The legal culture requirements in changes (revisions) to the Law also really need attention. Legal culture is the atmosphere of social thought and social forces that determine how law is applied, avoided or misused. According to Friedman, there are two legal cultures, namely:<sup>11</sup>

- 1) Internal legal culture, namely the legal culture related to attitudes and values of professionals working within the legal system;
- 2) The legal culture of the situation is the legal culture that encompasses the attitudes and values of society in general.

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<sup>10</sup>Esmi Warassih Pujiraha, 2005, *Legal Institutions A Sociological Study*, Suryandaru Utama, Semarang, p. 96.

<sup>11</sup>The Development of Law in Developing Countries The Role of Legal Culture, <http://tetrag5.blogspot.comdevelopments-law-in-developing-countries.html>, accessed 12 September 2016.

#### 4. Conclusion

Based on the results of research and discussion, it is known that the making of deed electronically has not yet obtained a strong legal basis, so it has not provided a guarantee of legal certainty. Legal certainty can be achieved if there are no conflicting provisions between one law and another. The legal substance in making notarial deeds electronically has not been fully accommodated in UUJN with the obligation to read the deed before the appearer in the presence of witnesses and failure to fulfill this requirement will result in legal sanctions for the notary.

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**Regulation:**

Act No. 11 of 2008 concerning Information and Transactions Electronic.

Act No. 2 of 2014 concerning the Position of Notary.

Act No. 30 of 2004 concerning the Position of Notary.

Act No. 11 of 2008 concerning Information and Electronic Transactions.